

Macy's California, Inc. and Cynthia L. Gomez.
Case 20-CA-23023

October 30, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On April 24, 1991, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The General Counsel filed exceptions and a supporting brief,¹ and the Respondent filed cross-exceptions and a supporting brief and an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order.

ORDER

The recommend Order of the administrative law judge is adopted and the complaint is dismissed.

¹ We have granted the General Counsel's motion to file an erratum to his brief in support of exceptions and have accepted the erratum filed.

² The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We find merit in the General Counsel's exception to the judge's requirement that the General Counsel show as part of his prima facie case of an 8(a)(3) refusal to hire violation that, absent an employer's unlawful motive, the alleged discriminatee would have been hired. Rather, to establish a prima facie case, the General Counsel must show that the applicant's union or protected concerted activity was a motivating factor in the respondent's decision not to hire him. The burden then shifts to the respondent to show that it would not have hired the applicant even in the absence of his union activities. See *Lewis Mechanical Works*, 285 NLRB 514 (1987). However, we conclude, based on the record before us, that the General Counsel has not established a prima facie showing here that the Respondent's refusal to hire Gomez was unlawfully motivated.

Boren Chertkov and Sherri Hayes Sawyer, for the General Counsel.

Lee E. Miller, for the Respondent.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding in which a hearing was held on January 31, 1991, is based upon an unfair labor practice charge filed by Cynthia L. Gomez (Gomez), on November 29, 1989, and upon

a complaint issued January 4, 1990,¹ on behalf of the General Counsel of the National Labor Relations Board (Board), by the Regional Director of the Board for Region 20, alleging that Macy's California, Inc. (Respondent), has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (Act), by failing and refusing to rehire its former employee Gomez on or about July 28, 1989, and continuing thereafter because of Gomez' union and/or protected concerted activities. Respondent filed an answer denying the commission of the alleged unfair labor practice.²

On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs submitted by General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Evidence

1. Background

Respondent, a corporation, owns and operates retail department stores. The stores involved in this case are located in the State of California in San Rafael and downtown San Francisco. The employees employed in the San Francisco store are represented by Local 1100 and those employed in the San Rafael store are represented by Local 1119.

The collective-bargaining agreement or agreements between Respondent and the above-named Unions provide in substance that when a job opening occurs it must be posted within the store for a certain number of days so as to afford current employees an opportunity to apply for the job. The record establishes that when a qualified current employee applies for such a posted position, he or she is given preference for the position over outside applicants.

Gomez was employed by Respondent in its warehouse and service center located in South San Francisco, California, called the El Camino Distribution Center (ECDC), as a customer service representative/bill adjuster from September 9, 1985, to May 18, 1988, when she voluntarily quit her employment there because she was moving to Santa Rosa, California. Immediately prior to her employment at ECDC Gomez worked for 5 years for another department store, The Emporium Capwell, as a customer service representative/cashier. Prior to her employment with The Emporium Capwell she worked for approximately 3 years at other retail stores, but the record does not indicate what types of jobs she held during that period. There is no record evidence to support the General Counsel's assertion that Gomez "had retail sales experience" during her 3 years of service in these retail stores.

¹ An amendment to the complaint issued January 17, 1991.

² Respondent's answer admits it is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act and meets one of the Board's applicable discretionary jurisdictional standards. Also, at the outset of the hearing, the Respondent admitted that the Unions involved, Department Store Employees Union Local 1100, United Food & Commercial Workers International Union, AFL-CIO (Local 1100) and Retail Clerks Local 1119, United Food & Commercial Workers International Union, AFL-CIO (Local 1119), are labor organizations within the meaning of Sec. 2(5) of the Act.

Gomez was hired to work at ECDC by Paula O'Garra, the facility's personnel manager. Late in 1986 O'Garra left, apparently to become personnel manager of the San Rafael store, and was replaced as ECDC's personnel manager by "Scott" who in turn was replaced by Teresa Clark, who was the facility's personnel manager in May 1988 when Gomez quit her employment. During Gomez' employment at ECDC, her immediate supervisor was Lois Moore who reported to Rose McWalters, the manager of the customer service department.

Respondent had no complaints about Gomez' work performance at ECDC and when she quit her employment there in 1988 the facility's personnel manager, Teresa Clark, told her she had an outstanding record, that Clark had enjoyed working with her, and Gomez should consider returning to work at ECDC, even though it would mean commuting from Santa Rosa.

Gomez, while employed at ECDC, was a member of Local 1100, the Union which represented the employees employed at that facility, and from mid-1987 until Gomez quit on May 18, 1988, she was Local 1100's shop steward. Also during the latter part of 1987, Gomez was one of between 15 and 20 employees who served on Local 1100's negotiation committee during the negotiations for a collective-bargaining contract between Local 1100 and Respondent.

During Gomez' tenure of approximately 1 year as Local 1100's shop steward, she went to Respondent, as shop steward, with 10 different grievances on behalf of the employees she represented. Besides grieving to supervision as shop steward, on behalf of the employees, Gomez, on more than one occasion, in concert with other female employees, protested to management about sexual harassment, as follows.

In 1986, on behalf of herself and several other female employees, Gomez complained to Supervisor Moore that Gomez and other female employees were being offered favors by Acting Supervisor Bernard Faye, on the condition that they return Faye's favors. Gomez told Moore that the female employees were frightened by this conduct. Moore brought this complaint to the attention of Department Manager McWalters who verbally reprimanded Faye, but he continued to engage in this conduct, even after being reprimanded several times. Then, in 1987, Gomez brought this complaint to Local 1100's attention and late in 1987 one of Local 1100's business representatives, in Gomez' presence, informed Michael Zorn, Respondent's vice president of employee relations, that there had been several complaints attributing sexual harassment to Bernard Faye, a department manager, and that the complaints concerned Gomez and other female employees employed at ECDC. The business representative warned Zorn that if Respondent did not take care of this immediately, Local 1100 intended to step in. Zorn was instructed by Attorney Lee Miller, Respondent's vice president of labor relations, who was also present, to take care of the matter immediately.

In 1986 Gomez went to the personnel office with employee Linda Simi to complain that one of the janitors had been touching Simi and Gomez and several of the other female employees as he emptied their wastebaskets. They first complained about this to Supervisor Moore and then went to the personnel department and complained about it to "Dolly," who worked in that department, inasmuch as the

personnel manager was not present that day.³ The result of their complaint was that Respondent prohibited the janitors from coming into the employees' work areas.

Finally, in 1986 and 1987 employee Linda Salmoran complained to Gomez she was being sexually harassed by "Bob," a warehouseman, because several times daily, during working hours, by telephone or in person, "Bob" would initiate conversations with her and ask her to go out with him after work and continued to engage in this conduct despite her protests. Gomez went with Salmoran to Supervisor Moore and reported this complaint and from there Gomez and Moore went to Personnel Manager Clark and the result was that Clark spoke to "Bob," who stopped bothering Salmoran.

2. Gomez applies for a job at Respondent's San Rafael store

On Friday, July 28, 1989,⁴ Gomez submitted an employment application to the personnel department of Respondent's San Rafael store, for employment at that store. The store's personnel manager, Paula O'Garra, was unavailable that day, so Gomez was instructed to telephone her on Monday, August 1.

Gomez' employment application stated she had previously been employed, as described above, by Respondent at ECDC and in the sections of the application entitled "position desired" and "schedule preferred," Gomez wrote "customer service or cashier," "part time (3-4/5 hour days)," and also wrote she was not available for work at night.

The record also indicates that when Gomez submitted her employment application, she also filled out a form which listed all of the jobs available in the San Rafael store and the days of the week the store was open for business, and which asked the applicant to check the areas he or she was experienced and interested in and to state the applicant's availability for work. Gomez wrote she was experienced and interested in the positions of "cashier" and "customer service rep" and was available to work only the day shift, Monday through Sunday, because she attended school at night.

On Monday, August 1, Gomez telephoned Personnel Manager O'Garra, who told her she remembered her from ECDC.⁵ After briefly reminiscing with O'Garra about "old times," Gomez stated she was eager to work for Respondent again and had applied for a job. She specifically told O'Garra she was interested in cashier, customer service, or sales work and was available days and weekends and if there was a night schedule. O'Garra replied she was in the process of posting job openings and, as Gomez knew from her past experience with Respondent, the current employees had preference to fill job openings. In view of this, O'Garra told Gomez to call back in 2 weeks and that in the meantime O'Garra would have Gomez' records transmitted from ECDC to the San Rafael store. This ended the conversation.

³ Gomez testified she was not sure whether O'Garra or "Scott" was the personnel manager at this time.

⁴ All dates hereinafter refer to the year 1989, unless specified otherwise.

⁵ As described above, O'Garra hired Gomez in September 1985 to work at ECDC and was the personnel manager at the facility during Gomez' employment until late in 1986, when she apparently transferred to the San Rafael store.

On Monday, August 14 Gomez telephoned O'Garra and reminded her of their previous conversation. O'Garra told Gomez there was no job available in customer service. Gomez replied she would be happy to work in sales if there was a job available there. O'Garra stated that the only available sales jobs were full-time, not part-time jobs. Gomez stated she would accept full-time work or whatever was available. O'Garra stated she would have to check the job postings and asked Gomez to get back to her. This ended the conversation.

Later, during the week of August 14, Gomez telephoned O'Garra and asked her what jobs were available. O'Garra replied there might be a job available in the cashier, customer service area because a lady employed there was going on maternity leave, but this would not occur until late September or early October and since O'Garra was not really sure of this she would have to get back to Gomez. Gomez stated she was still interested in a sales position, if anything in sales was available. O'Garra stated it would depend on what was posted and told Gomez to telephone her again. This ended the conversation.

On or about August 21 Gomez telephoned O'Garra and was told she was on vacation and would return to work after Labor Day. Thereafter, on or about September 4 or 5 Gomez went to the San Rafael store and confronted O'Garra on the sales floor as she was on her way out of the store. Gomez reminded her that she had promised Gomez to check on the jobs which were posted and to see what was available for Gomez. O'Garra acknowledged she had made this promise and stated there was nothing available in customer service and that in sales there were only part-time jobs available. Gomez replied that part-time work would be fine. O'Garra stated she could not talk with Gomez right then because she was in a rush and had to leave and asked Gomez to phone her. Gomez stated she would phone her the next week. O'Garra stated that would be fine and walked out of the store.

On September 8 Gomez telephoned O'Garra and asked, "what was going on about the job posting and what was the availability and asked why she could not give Gomez an answer about the full-time or part-time jobs" and stated she was puzzled about the way in which O'Garra had been treating her. O'Garra answered by stating, "what she wanted was someone with full-times sales experience." Gomez stated she had sales experience, had worked for Respondent and knew its rules, regulations, and policies, and had retail experience with The Emporium Capwell. O'Garra replied, "she just wanted sales experience." Gomez answered that she knew Respondent hired inexperienced people for sales work who had no knowledge of Respondent's policies. O'Garra stated that that did not matter, that she just wanted sales experience and could not help Gomez and there was nothing else she could do for Gomez. This ended the conversation.

The description of Gomez' several conversations with Personnel Manager O'Garra, set forth in detail above, is based upon Gomez' uncontradicted testimony. I considered that in her employment application and in the other document she filled out for Respondent contemporaneously with the application, Gomez stated she desired employment as a customer service representative or cashier and preferred to work part time and was not available for work at nights, whereas she testified she informed O'Garra that she would be happy to

accept a job in sales and to work full time, as well as part time, and was available to work at nights. I credited this portion of Gomez' testimony because when Gomez testified about her several conversations with O'Garra, she testified forthrightly, consistently, and without hesitation in a sincere, plain, and clear manner, and her testimonial demeanor was excellent.⁶ It is also very significant that Personnel Manager O'Garra was not called by Respondent to dispute Gomez' testimony, thus warranting the inference that O'Garra's testimony would have been adverse to Respondent and consistent with Gomez', if she had testified.⁷ See *International Automated Machines*, 285 NLRB 1122, 1122-1123 fn. 5 (1987), and *Paramount Poultry*, 294 NLRB 867 (1989).

The parties stipulated that between July 1 and December 31 there were jobs open, including sales jobs, at the San Rafael store which did not require typing and machine tests, and between July 1 and September 30 there were no customer service/cashier jobs open at the San Rafael store.

The parties agreed that after the close of the hearing Respondent's attorney would investigate to determine whether there were any job openings for the positions of customer service/cashier in the San Rafael store during the months of October, November, and December, and would submit a letter to me setting forth the results of his investigation. By letter dated April 1, 1991, Respondent's attorney informed me:

I have reviewed all job requisitions and temporary Christmas requisitions for positions at Macy's San Rafael store between October 1, 1989 and December 31, 1989. During that time period, there were no regular full time or part time customer service/cashier positions filled. During that time period, a temporary part time Christmas customer service/cashier position was filled. This Christmas temporary position was filled for the period between November 17, 1989 and December 25, 1989, at which time the position terminated.

The parties stipulated that between July 1 and December 31 periodically there were advertisements for sales, stock, and gift wrapping positions, and security positions for the San Rafael store.

The General Counsel in a further effort to show that there were job openings at the San Rafael store for sales positions during the months of August, September, and October introduced into evidence, without objection, General Counsel's

⁶It is not unusual for applicants to be considered by Respondent for jobs other than those set forth in the application. Respondent's vice president of employee relations Michael Zorn testified that when a job applicant submits an employment application, what is specified in the application does not limit the jobs for which the applicant would be considered because, as Zorn testified, "the interview basically will elaborate on the application itself." In this regard, Gomez testified that when she filled out her application it did not even dawn on her to note her interest in a sales job, because "I was just getting to the point where I wanted to interview. And I basically wasn't thinking as much about what was on the application."

⁷Respondent in its answer to the complaint admitted that Personnel Manager O'Garra is an agent of Respondent and a supervisor within the meaning of Sec. 2(11) of the Act and was currently employed by Respondent. There is no evidence or contention that O'Garra at the time of the hearing herein was no longer in Respondent's employ.

Exhibits 7 through 9, membership applications submitted by employees of the San Rafael store to Local 1119. The sections of the membership applications entitled "date of hire" and "type work performed" were filled in by a Local 1119 secretary, based upon information the secretary received from the employees who signed the applications. The applications for membership show that the signatory employees told the secretary who filled in the applications that on the dates they signed the applications, dates subsequent to their hire dates, that they were performing the following types of work: "on call"; "flyer"; "young collectors"; "domestics"; "fine jewelry"; "shoes"; "accessories"; "mens"; "housewares"; "childrens"; "cosmetics"; and "lingerie." The record does not reveal whether any of the aforesaid types of work performed constitute sales work, in whole or in part, or that any of these applicants for membership were hired to fill vacant sales positions.

3. Local 1119's president complains to Respondent's vice president of employee relations about Respondent's refusal to employ Gomez at the San Rafael store

Late in August Gomez contacted Harold Barling, the president of Local 1119, the Union which represents the employees employed at the San Rafael store, and told him she had previously worked for Respondent at ECDC, where she was Local 1100's shop steward, and was now applying for work at the San Rafael store and felt she was being given the run-around by the personnel manager because of her union activity while employed at ECDC. She asked Barling's advice. Barling stated he would contact Michael Zorn.

Zorn, Respondent's vice president of employee relations, represents Respondent in civil suits; EEOC matters; other agency hearings; grievance and arbitration proceedings initiated by the several unions which represent Respondent's employees; and in contract negotiations with these unions. He handles such matters for 28 of Respondent's stores including the San Rafael and San Francisco stores and ECDC. In the past he has had dealings with Barling concerning contract negotiations and employees' and Local 1119's grievances.

Early in September Barling telephoned Zorn and told him Gomez thought she was getting the runaround in connection with her effort to secure a job at Respondent's San Rafael store. Barling also told Zorn that Gomez believed she was being discriminated against because of her past union and concerted activities. Barling warned Zorn that potentially Respondent was facing charges being filed with the NLRB and possibly charges being filed with other governmental agencies because of its refusal to hire Gomez. Zorn replied he would check into the matter and get back to Barling.

Subsequently, in mid-September, while speaking with Barling about other matters, Zorn told Barling he had checked with four of Gomez' former coworkers and they had stated Gomez was a "troublemaker" whom they did not want to work with again. Barling replied, he would check out the allegation.

Later in September, after having investigated Zorn's "troublemaker" allegation, Barling telephoned Zorn and told him he had spoken to Michael Ayres, Local 1100's business representative, and that Ayres had told him the rank-and-file employees who had worked with Gomez at ECDC and were still employed there stated they would be more than happy

to work with her again. Barling asked Zorn to give him the names of the people that had labeled Gomez a "troublemaker." Zorn refused, on the basis of confidentiality, and asked Barling to reveal the names of the employees who stated they liked working with Gomez and wanted to work her again. Barling refused, on the basis of confidentiality. The conversation ended with Zorn agreeing to meet with Barling and Gomez later that month to see what they could do about getting Gomez a job with Respondent.

The above description of Barling's conversations with Zorn is based upon Barling's testimony. Zorn acknowledged that the conversations occurred, but denied Barling indicated Gomez believed her union or concerted activities at ECDC was responsible for her being given a runaround when she sought employment at the San Rafael store, and denied he used the word "troublemaker" in describing how persons employed at ECDC felt about Gomez.

I credit Barling's above-described testimony because his testimonial demeanor was good, whereas Zorn's was not so good, and Zorn's denial that he told Barling that he had been informed that Gomez had been a "troublemaker" while employed at ECDC is highly suspect because of Respondent's failure to call Sharon McBaron, Respondent's ECDC personnel manager, to corroborate Zorn's testimony in that respect.

In this last regard, Zorn testified that during his second conversation with Barling, when Zorn arranged to meet with Gomez and Barling, he explained to Barling that Gomez' personnel file was generally satisfactory, but that he had received "some feedback that at times her personality her moods, caused others some tension." Zorn further testified his reason for saying this to Barling was that immediately after his initial conversation with Barling about Gomez' complaint that she had been given the runaround when she applied for a job at the San Rafael store, Zorn immediately telephoned Sharon McBaron, ECDC's personnel manager, and asked McBaron to go through Gomez' personnel file and to question some of the persons whom Gomez had worked with at ECDC, and after she had done this to advise Zorn what Gomez' personnel record contained and what these persons said about Gomez, so that Zorn would have "a sense of who she was." Zorn further testified that McBaron subsequently called him back and told him there was nothing negative in Gomez' personnel file, that she appeared to have been a good employee, but that McBaron had been informed by persons who had worked with Gomez that there had been tension between Gomez and other employees at times because Gomez had "mood swings or was moody."

In other words, in denying he told Barling that others had described Gomez as a "troublemaker," Zorn testified he merely relayed to Barling the above-described information furnished to him by Personnel Manager McBaron. However, for an unexplained reason, McBaron was not called by Respondent to corroborate Zorn's testimony. There is no evidence or contention that McBaron was no longer employed by Respondent at the time of the hearing. Under the circumstances, I am persuaded that Respondent's unexplained failure to call McBaron to corroborate Zorn's testimony warrants the inference that she would not have corroborated his testimony, but instead would have given testimony adverse to Respondent concerning Zorn's testimony. See *Greg Construction Co.*, 277 NLRB 1411, 1415, 1419, 1421 (1985) (Board drew adverse inference from the General Counsel's

failure to call chairman of board to corroborate testimony of superintendent concerning statements and instructions made by chairman that supported theory of violation).

Zorn also testified that immediately after his initial telephone conversation with Barling about Gomez' complaint, that in addition to questioning McBaron about Gomez, he telephoned the San Rafael's store personnel manager, Paula O'Garra. He testified he asked why O'Garra had not hired Gomez, and O'Garra informed him Gomez had applied for clerical positions in the area of customer service/cashier and there were no vacancies in any of those positions in the San Rafael store. As I have noted above, O'Garra was not called by Respondent to corroborate Zorn's testimony. It is also significant that when Zorn telephoned Barling after speaking to O'Garra, it is undisputed that Zorn did not explain to Barling that the reason O'Garra had not hired Gomez was that Gomez had applied for customer service/cashier clerical positions and there were no vacancies in any of those positions at the San Rafael store. It is for all of those reasons, including Zorn's unfavorable testimonial demeanor, that I do not credit his account of his conversation with O'Garra.

4. Zorn meets with Barling and Gomez

On September 26, as previously agreed, Zorn met with Barling and Gomez at Local 1119's office. Zorn indicated he remembered Gomez' face and, in response to Zorn's inquiry about her career goals, Gomez indicated she had an interest in fashion design and that recently a counselor suggested she should look for a position in the "buying line" to further her career goals in fashion designing. Zorn pointed out that Respondent's buying was centrally located in its San Francisco store and asked if Gomez would like to work in that store. Gomez stated she was willing to work wherever there were openings, whether it was in San Francisco or in San Rafael, and would take "any position available." Zorn told her he was willing to set up a meeting between Gomez and a recruiter for the San Francisco store. Gomez indicated this was acceptable. Zorn tried unsuccessfully to reach the recruiter by phone. He then gave Gomez his telephone number and took Gomez' phone number and told Gomez he would have the recruiter contact her, and stated that if the recruiter failed to contact her that she should phone him because he did not want to lose touch with her. Zorn also told Gomez he would pick up her employment application and paperwork from the San Rafael store and take it to the San Francisco store, so Gomez would not have to fill out another employment application or do any of the other paperwork in San Francisco. Zorn explained that Gomez would have to go through several interviews, that the recruiters would help place her, that he did not want her to get caught up in the hiring of Christmas help, that if there were any "crossed wires" Gomez should contact him immediately, that she had his word he would help her and he stood by his word, but that in order to get a job she would have "to sell herself" to the interviewers. The meeting ended with them shaking hands.⁸

⁸Zorn testified briefly about this meeting. Gomez testified at greater length about the meeting. Their testimony concerning what was stated does not conflict. Accordingly, the above description is based upon a composite of their testimony.

5. Gomez applies for employment at Respondent's San Francisco store

On October 4 Joan Fujii, the head of personnel for the San Francisco store, telephoned Gomez and arranged for them to meet later that day at Fujii's office in the San Francisco store.⁹ Fujii began the October 4 meeting by asking Gomez to describe her career goals. Gomez stated she was interested in "high fashion dressing." Fujii stated there was a vacancy on the day shift for a part-time sales position in the Liz Claiborne department selling high fashion designer clothing. Gomez indicated she would be willing to accept that position if it was offered to her. Fujii then asked if Gomez was interested in any work besides sales. Gomez replied that while employed by Respondent at ECDC she had applied for several office jobs including jobs connected with the work of Respondent's buyers, but due to her lack of seniority did not get any of those jobs. She told Fujii she would be interested in any job openings for buyer's clerk. Fujii made a telephone call and then told Gomez there was an opening for a buyer's clerk in the fine jewelry department and asked if Gomez would be interested in interviewing for that position. Gomez asked whether the vacancy was for a buyer's clerk position or for a position in Respondent's office support center, and explained to Fujii she was not interested in applying for a position in Respondent's office support center because she could not type. Fujii assured her that the opening she was talking about was for a buyer's clerk position. Gomez stated she would like to interview for that position, and stated if she was not hired for the buyer's clerk position in the fine jewelry department, she would like to be interviewed for the vacant Liz Claiborne sales position. Fujii replied, "Why don't you just interview for the buyer's clerk position first and then we will worry about the Liz Claiborne position after. Gomez agreed and Fujii at that time informed Gomez that she had set up an October 7 appointment for Gomez to meet with Diana Bouillon, the personnel manager for the Respondent's divisional offices.¹⁰

During the time material and at the time of the hearing, Bouillon, in her capacity as personnel manager for the divisional offices, was responsible for the hiring, termination, and counseling of all employees who perform sales support office functions for Respondent in the San Francisco area.

On the morning of October 7, as arranged by Fujii, Gomez returned to the personnel department of Respondent's San Francisco store for her meeting with Bouillon. When she informed one of the personnel department's clerks that she was there for her interview with Bouillon, the clerk asked her to

⁹Diana Bouillon, the personnel manager for Respondent's divisional offices, testified that during the time material and at the time of the hearing in this case, Fujii was Bouillon's "manager" (Tr. at 235). However, in its posthearing brief Respondent stated that Fujii occupies the position of the head of personnel for Respondent's San Francisco store.

¹⁰The above description of Gomez' October 4 interview with Fujii is based upon Gomez' uncontradicted testimony. I considered that in her prehearing affidavit submitted to the Board's General Counsel on December 13, 1989, Gomez failed to mention discussing a sales job with Fujii during this interview. I credited her testimony in this respect because when she testified about this interview her testimonial demeanor was excellent and she testified without hesitation in a straightforward and sincere manner. I also note that Fujii was not called to contradict her testimony.

fill out an employment application and to take a written psychological quiz. Gomez stated she did not think she had to do this because her appointment had been scheduled by Fujii. She asked to speak to Bouillon. The clerk told her that normally applicants filled out employment applications before being interviewed. Gomez stated she realized that, but asked the clerk to please check. The clerk left and when she returned told Gomez that Bouillon had stated Gomez would have to fill out an employment application and take the psychological quiz or Bouillon would not meet with her. The clerk gave a copy of the quiz and the employment application to Gomez, who told the clerk she had already filled out an employment application. The clerk stated Bouillon wanted her to complete the application again. Gomez completed the application and the quiz and gave both documents back to the clerk who stated she would give them to Bouillon. In the section of the employment application which stated "position desired," Gomez wrote that she was interested in applying for the fine jewelry buyer's clerk position.¹¹

On October 7, shortly after the personnel department clerk took Gomez' completed employment application and psychological quiz to Bouillon, Gomez met with Bouillon in Bouillon's office. After the introductions, Bouillon, who was looking at the employment application which Gomez had just filled out, asked about Gomez' background. Gomez informed her that she had worked for Respondent at ECDC. Bouillon stated she was familiar with the job duties performed by the employees employed at that facility. Gomez stated that while employed there she had operated several different office business machines which she enumerated. Bouillon commented that Gomez was applying for the position of fine jewelry buyer's clerk. Gomez asked her to describe the job of fine jewelry buyer's clerk. Bouillon stated that basically the clerk performed almost the same kind of duties as Gomez had performed while employed at ECDC, except that the buyer's clerk works closer with the buyer. Gomez stated this was fine because, based on her past work experience at ECDC, she knew how to deal with buyers and vendors. Bouillon then alerted Gomez to the fact that she was interviewing other applicants for the buyer clerk's position who were already employed by Respondent and therefore had seniority for that position, and told Gomez it would take Bouillon about 2 weeks to conduct those interviews.¹² Bouillon asked Gomez to take an aptitude test that she explained would test Gomez' aptitude for mathematics and for operating a typewriter, adding machines, and computer terminals.

¹¹ The above description of what occurred when Gomez arrived for her appointment with Bouillon on October 7 is based upon Gomez' uncontradicted testimony. Gomez testified without hesitation and in a straightforward and sincere manner and her testimonial demeanor was excellent.

¹² On October 3 the employees employed at Respondent's San Francisco store were notified by means of a posted notice that they could submit a bid sheet to the personnel office for the vacant position of buyer's clerk in the fine jewelry-fine watches department and that appointments for interviews would be scheduled. The posted notice stated that to qualify for this position, applicants "must": "have excellent verbal and written communication skills"; "be able to work independently and prioritize effectively"; "be organized and have good attention to detail"; "meet standards attendance record"; and "have excellent phone and customer service skills." There was no requirement that the applicants for this position take any kind of a test or pass a test.

Gomez replied she did not type, but had experience in operating various office business machines, which she enumerated, and asked if the buyer's clerk for the fine jewelry department did any typing. Bouillon answered "no," and explained that only those clericals employed in Respondent's office support center did typing. Gomez asked why, if that was true, she needed to take the typing test because she was certain to flunk that test. Bouillon stated it was not a pass or fail test, but was just an aptitude test. Bouillon at this point gave Gomez an appointment card which stated she was scheduled to take the aptitude test on October 10. Gomez thanked Bouillon and Bouillon stated Gomez would hear from her after she took the test.

The above description of Bouillon's October 7 meeting with Gomez is based upon Gomez' testimony which conflicts with Bouillon's account of the meeting. Bouillon disputed Gomez' testimony that on October 7 Gomez filled out a new employment application. Bouillon testified the only employment application concerning Gomez which Bouillon ever possessed was the one Gomez submitted to Respondent's San Rafael store on July 28. As to what was said during the October 7 meeting, Bouillon testified as follows: Gomez told Bouillon that her career goal was to eventually become an executive in Respondent's buying office, and Bouillon informed her that the normal way for her to advance her career in that direction would be to go into sales and eventually become a sales manager and then go into the buying office; Gomez answered she was not interested in sales work but would like to work in an office; Bouillon told Gomez that since she did not want to work in sales, then the second best route for her to become an executive in the buying line would be to work in Respondent's office support center; Bouillon described the duties of an office support center employee, one of which was typing; Gomez did not indicate she was unable to type; the vacant buyer's clerical position in the fine jewelry department was not mentioned during this meeting; and, the meeting ended with Bouillon informing Gomez that because Gomez was not interested in sales, that the position in the office support center would be the best match for her, based upon her career goals, and that Bouillon would arrange for Gomez to be tested for that position, and Gomez agreed.¹³

I reject Bouillon's above-described testimony in its entirety and credit Gomez' account, described above, because Bouillon's testimonial demeanor was poor, whereas Gomez' was excellent and she testified without hesitation in a straightforward and sincere manner.

Having received the impression from Zorn's comments at their September 26 meeting that all that was required of her in order to get a job at the San Francisco store was to sell herself to the interviewers and that Zorn would take care of all of the paperwork, Gomez was unhappy about having to fill out a new employment application and to take a psycho-

¹³ On October 5 the employees employed at Respondent's San Francisco store were notified by means of a posted notice that they could submit a bid sheet to the personnel office for three vacant office support center associate positions in the office support center department and that appointments for interviews would be scheduled. The notices described the "qualifications" required for those position, as follows: "Excellent verbal and written communication skills. Muss [sic] pass following tests: type 40wpm, Math, PC. Must be detail oriented, flexible and have meets standards attendance record."

logical quiz and being required to take a typing test which she knew she would not be able to pass. In view of this, she tried without success to reach Zorn by telephone on Monday, October 9, and left a message for him to phone her at home.

On October 10 Gomez telephoned the personnel department at Respondent's San Francisco store to postpone her test scheduled for that day. She told the person whom she spoke to that she had to handle another business matter that day and after she had taken care of that business matter would call Respondent to reschedule her test, and asked if that was acceptable. She was informed it would be all right if she called back to reschedule her test. It is undisputed that Gomez never contacted Respondent to reschedule her test.

Later during October 10, Zorn returned Gomez' telephone call. Gomez told him she had gotten caught up in the Christmas employment shuffle when she had gone to the San Francisco store on October 7 to apply for a job, because she had been required to fill out a new employment application and take a quiz and that Bouillon was asking her to take a test that included a typing test, even though she did not type. She asked why she had been required to fill out a new employment application and take a quiz, and Zorn answered, "I don't know." Zorn told Gomez that Fujii had the employment application Gomez had filled out when she applied for a job at the San Rafael store. Gomez pointed out that when, on October 7, she was asked to fill out a new employment application, that Fujii was standing right there and did not say anything. Gomez also told Zorn that Bouillon was requiring her to take a test, which included a test of her typing skills, for the position of buyer's clerk in the jewelry department, even though Gomez did not know how to type and even though typing was not a requirement for the position. Zorn replied that Gomez had to take the test because all of the employees who worked at Respondent's ECDC facility were not as bright as they claimed to be and Zorn wanted them tested. Gomez stated she had never been tested for any of the other jobs she had interviewed for while employed by Respondent at ECDC from 1985 through 1988. Zorn answered that he was unable to give her an explanation for that. Gomez asked what she should do. Zorn told her he would speak to Bouillon and learn what happened with her interview and to her application and would get back to her.¹⁴

A few days after Gomez' October 10 conversation with Zorn, Local 1119's president, Barling, pursuant to Gomez' request, telephoned Zorn and told him Gomez had complained that when she went to the San Francisco store to apply for a job that she felt she had been given the run-around: she had been treated like she had just walked in off the street; no one knew who she was or what she was there for; and, she was required to take tests including a typing test even though typing was not a requirement of the job she was interviewing for and even though the other office equipment she was going to be tested on was equipment she had

used regularly and proficiently while employed at ECDC. Zorn replied Respondent wanted her to take the requested tests, that Gomez was being argumentative and uncooperative, and explained there had been other employees from Respondent's ECDC facility who had applied for positions at the San Francisco store claiming they were able to operate office equipment proficiently, when in fact that was not the case. Barling asked why, instead of fooling around with testing Gomez' ability to operate office equipment, Zorn did not find her a position at the San Rafael store. Zorn replied, "I am not going to shove her down anybody's throat." The conversation ended with Barling stating "We will just have to do what we have to do," and stated he would speak to Gomez.¹⁵

As noted above, after canceling her test which was scheduled for October 10, Gomez did not recontact the personnel department of Respondent's San Francisco store to arrange to reschedule the test. On October 23 Divisional Personnel Manager Bouillon made the following entry on the employment application submitted by Gomez on July 28 to Respondent's San Rafael store. Bouillon checked the box which states, "candidate not interested in job available," and wrote that Gomez, "called to cancel testing—never called back to reschedule."

Regarding the buyer's clerk opening in the fine jewelry department of the San Francisco store, the position in the San Francisco store for which I have found Gomez specifically applied, the record reveals that this job opening was posted in early October for current San Francisco store employees to bid upon, that three San Francisco store employees bid for the position, and that one of the three, Margaret Caponio, was hired on October 30 to fill the position. The record further reveals that even if an applicant from outside of the San Francisco store was better qualified than Caponio, Respondent would have been required to hire Caponio to fill that position, pursuant to its policy of giving preference to current store employees to fill such job openings.

The parties stipulated that between July 1 and December 30 there were job openings, including sales jobs, at the San Francisco store which did not require typing and office machine tests and further stipulated that between July 1 and December 31, periodically there were advertisements for sales, stock and gift wrapping positions, and security positions for the San Francisco store.

¹⁴ The above description of Gomez' telephone conversation with Zorn is based upon Gomez' testimony. Zorn testified that in response to Gomez' complaint that she was being required to take some tests, he explained to her that if the position she was applying for required testing that she needed to take the test. He further testified that Gomez did not tell him she was unable to type. I reject Zorn's account, to the extent it is inconsistent with Gomez' account of their conversation, because Gomez' testimonial demeanor, which was excellent, was better than Zorn's, which was not so good.

¹⁵ The above description of Barling's conversation with Zorn is based upon the testimony of Barling, who impressed me as a sincere witness and whose testimonial demeanor was good. Zorn testified that when Barling spoke to him about Gomez' complaint concerning the testing, that Zorn explained to Barling the tests involved were aptitude tests and an arbitrator, in interpreting Local 1100's contract with Respondent, had concluded Respondent had the right to require applicants to take such tests at its San Francisco store. Zorn also testified that when Barling suggested he find a position for Gomez at the San Rafael store that he answered by stating there were no clerical positions vacant at the store and he did not intend to force that store to create such a position for Gomez. I reject Zorn's account, to the extent it can be viewed as contradicting Barling's account of their conversation, inasmuch as Barling's testimonial demeanor, which was good, was better than Zorn's, which was not so good.

6. Gomez' September 1989 conversation with Lois Moore

As found above, during the approximately 3 years Gomez worked at Respondent's ECDC facility, her immediate supervisor was Lois Moore, who managed several of the facility's departments including the one in which Gomez worked. In September Gomez telephoned Moore for advice about what to do in order to get a job with Respondent at its San Rafael store.¹⁶ During this conversation, Gomez asked whether Moore knew of any complaints included in Gomez' personnel file concerning Gomez' conduct while employed at ECDC, and specifically asked whether Gomez was perceived as a "troublemaker."¹⁷ Moore answered by stating that Gomez had nothing to worry about, that her personnel file was a "clean file" which contained no complaints about her of any kind. However, Moore stated she recalled that Gomez' personnel file contained references to the complaints Gomez had raised about Bernard Faye; "Felix," the janitor; "Bob," the warehouseman; and two janitors.

Moore's reference to Gomez' complaint about "Felix, the janitor" refers to Gomez' 1986 complaints to Personnel Manager O'Garra about being sexually harassed by "Felix," the manager of the store's janitors. There is no evidence that Gomez' complaints to management about "Felix's" alleged sexual harassment of her concerned any employee other than Gomez personally. Moore's reference to Gomez' complaints concerning Bernard Faye, "Bob" the warehouseman and the two janitors have already been described above, and, as I have found above, refer to occasions when Gomez in concert with other female employees complained to management about sexual harassment.

B. Discussion

As described in detail above, Cynthia Gomez quit her employment at Respondent's ECDC facility in May 1988 and during the latter part of 1989 applied for work at Respondent's San Rafael and San Francisco stores, and Respondent failed and refused to employ her at either of those stores. The complaint alleges Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to rehire Gomez because of her union and protected concerted activities.

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400-405 (1983), the Supreme Court approved the Board's procedural analysis, first set forth in *Wright Line*, 251 NLRB 1083 (1980), for resolving questions of motivation in alleged unlawful discrimination cases. Under this analysis, the Board's General Counsel has an initial burden to show that the employee's protected conduct was a "substantial or motivating factor" in the employer's decision to take the adverse action against the employee. Once the showing of an unlawful motive has been made, the employer has the burden of establishing, as an affirmative defense, that there were also legitimate reasons for its decision and that those reasons would have caused the employer to take the same action against the alleged discriminatee irrespective of

the alleged discriminatee's protected activity. *NLRB v. Transportation Management Corp.*, 462 U.S. at 400-403.

In a case where, as here, an employer is alleged to have violated the Act by refusing to hire a job applicant because of the applicant's protected conduct, under the *Wright Line* test the General Counsel must show as a part of his prima facie case, that absent the employer's unlawful motive the alleged discriminatee would have been hired. *Food Park*, 277 NLRB 427 (1985). In *Foods Park*, where an administrative law judge concluded that the employer violated Section 8(a)(3) and (1) of the Act by refusing to hire certain applicants for employment, the Board remanded the case to the administrative law judge because, among other things, the administrative law judge failed to find that absent the unlawful motivation the alleged discriminatees would have been hired by the employer. In this regard, the Board stated (*Id.* at 427):

[T]he decision is devoid of findings that, absent unlawful motivation, the alleged discriminatees would have been hired. This analysis is vital where the complaint, as here, alleges a refusal to hire named employees. Where a refusal-to-consider violation is found, however, the determination of whether a particular individual would have been hired, absent the Respondent's discrimination, is properly left to the compliance proceeding. [Citations omitted.]

For the reasons set forth below, I am persuaded that the record in the instant case does not establish that absent unlawful motivation, during Respondent's normal course of business, Respondent would have hired Gomez at its San Rafael or San Francisco stores, in response to her applications for employment at those stores.

As described in detail above, in applying for a job at Respondent's San Rafael and San Francisco stores Gomez made it perfectly plain to Respondent's representatives that although she preferred to work as either a customer service representative or as a cashier, or as a buyer's clerical in the San Francisco store's fine jewelry department, that if Respondent was not able to place her in any of those positions, in the alternative she desired to work for Respondent as a salesperson.

Regarding Gomez' application for a position as a customer service representative or as a cashier, there is no evidence that either the San Rafael or San Francisco stores, during the time material had openings for those positions. Quite the opposite, insofar as the San Rafael store is concerned the record shows that between July 1 and December 31 there was only one customer service/cashier position open and that was for a temporary part-time Christmas position filled for the 5-week period from November 17 to December 25.

Regarding Gomez' application for the position of buyer's clerk in the San Francisco store's fine jewelry department, the record demonstrates above, that during the normal course of business Respondent would not have hired Gomez to fill that vacancy, but would have hired another applicant, pursuant to its policy of giving preference to current store employee-applicants to fill such job openings.

Regarding Gomez' application for a sales position, there is no evidence that Gomez had previous sales experience or that Respondent usually hires inexperienced applicants to fill

¹⁶I note that there is no evidence or contention that Moore at this time was no longer employed by Respondent.

¹⁷Local 1119's president, Barling, had previously informed Gomez that Zorn, Respondent's vice president of employee relations, had told Barling that Gomez' coworkers at ECDC felt she was a "troublemaker."

sales positions, or that during the time material open sales positions were filled by inexperienced applicants. The record shows that for 8 years, immediately prior to the time material, Gomez was not employed in a sales position; during this period she was employed first by The Emporium Capwell department store as a customer service representative/cashier and then by Respondent as a customer service representative/bill adjuster. Prior to this, Gomez testified she had worked for approximately 3 years for other retail stores, but significantly she did not testify that she was employed, in whole or in part, as a salesperson. There is no reason for me to infer that she worked as a salesperson during this period. Quite the opposite, Gomez' failure to write on her employment application that she had worked as a salesperson during that period, as well as her failure to testify she had worked as a salesperson, warrants the inference that she had no sales experience.

The sole evidence which even colorably indicates Gomez had sales experience is her testimony, described above, that on September 8, when Personnel Manager O'Garra informed Gomez that "what O'Garra wanted was someone with full-time sales experience," Gomez answered she had "sales experience" and knew Respondent's policies and had also worked for The Emporium Capwell department store. It is significant, however, that when O'Garra replied "she just wanted sales experience," that Gomez did not further argue she was an experienced salesperson or elaborate about her alleged "sales experience," but instead answered that she knew Respondent hired inexperienced people for sales work. There is no evidence whatsoever that Respondent has a practice of filling sales positions with inexperienced applicants or that during the time material open sales positions were filled by the Respondent with inexperienced applicants.

It is for the foregoing reasons that I am persuaded the record does not contain prima facie proof that absent unlawful motivation Respondent during its normal course of business would have hired Gomez to work in its San Rafael or San Francisco store, in response to her applications for employment.¹⁸ It is for this reason that I shall recommend that the complaint be dismissed in its entirety.

¹⁸In order to make a prima facie showing that absent unlawful motivation a respondent-employer would have hired an alleged applicant-discriminatee, the General Counsel need only show that the discriminatee was qualified to fill the position for which the discriminatee applied. See, e.g., *Hutchens Trucking Co.*, 268 NLRB 509, 513 (1984), cited in *Food Park*, 277 NLRB at 427. In the instant case, as I have found above, although Gomez applied for a sales position, there is no evidence whatsoever that she was qualified to fill any of the vacant sales positions or that Respondent during the time material hired unqualified applicants to fill sales positions.

Counsel for the General Counsel at the conclusion of the hearing indicated he might move to amend the complaint so as to include a "refusal-to-consider" violation as well as the alleged "refusal-to-hire" violation. I indicated I would be disposed to deny such an amendment because to allow it at that late hour would constitute a denial of due process, inasmuch as Respondent had no notice that the General Counsel intended to litigate the case based upon a "refusal-to-consider" violation and the allegation was not litigated by Respondent. My review of the record has not persuaded me to change my mind.

In view of the significant difference between the alleged "refusal-to-hire" violation and a "refusal-to-consider" violation, if Respondent had timely notice that the General Counsel was relying upon a "refusal-to-consider" theory, to prove his case, it cannot be assumed Respondent would have litigated the case in the same manner. In this respect, I note that since the General Counsel, as part of his case, failed to make a prima facie showing that, absent unlawful motivation, Respondent during its normal course of business would have hired Gomez to fill one of the positions she applied for, the Respondent did not need to call Personnel Managers O'Garra and Fujii to successfully defend itself against the "refusal-to-hire" violation. If, however, the complaint had been based in part upon a "refusal-to-consider" violation it is highly likely that Respondent would have given more thought to calling O'Garra and Fujii as witnesses: (1) in order to deal with Gomez' testimony that she informed O'Garra and Fujii that if the positions she had applied for on her employment applications were not available, that she would like to be considered for a sales position; and/or (2) in order to testify concerning their consideration of Gomez for a sales position. It is for all of the aforesaid reasons that I have not considered whether Respondent violated the Act by refusing to consider Gomez' employment applications because of her union and protected concerted activities.¹⁹

On these findings of fact and conclusions of law, and the entire record, I issue the following recommended²⁰

ORDER

The complaint herein is dismissed in its entirety.

¹⁹I note that counsels for the General Counsel in their posthearing brief did not argue that Respondent violated the Act by refusing to consider Gomez' applications for employment but, as alleged in the complaint, argued that Respondent violated the Act by refusing to hire Gomez.

²⁰If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.